

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA, Case No. 09CR400

Plaintiff,

September 30, 2009

vs.

SCOTT GRAHAM,

Defendant.

TRANSCRIPT OF CHANGE OF PLEA PROCEEDINGS
BEFORE THE HONORABLE GEORGE J. LIMBERT
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Government:

Robert W. Kern,
Assistant United States Attorney
801 West Superior Avenue
400 U.S. Court House
Cleveland, Ohio 44113
(216) 622-3600

For the Defendant:

Ian Friedman, Esq.

1 THE CLERK: The Court calls Case Number
2 5:09CR400, United States of America versus Scott Graham.

3 THE COURT: We're here for an initial
4 appearance, arraignment and plea.

16:05:18 5 Why don't you have the defendant come up to
6 the podium?

7 First of all, since this is an initial
8 appearance, I want to advise the defendant that he is not
9 required to make any statement. That if defendant has made
16:05:44 10 a statement, he need say no more. If the defendant starts
11 to make a statement, he may stop at any time. Any statement
12 made by defendant may be used against him.

13 I have been informed that Mr. Graham wishes to
14 plead guilty to the charges presented.

16:06:30 15 Is my understanding correct?

16 MR. FRIEDMAN: You are understanding that
17 correctly, Your Honor.

18 And I am Ian Friedman on behalf of Mr. Graham.
19 Thank you.

16:06:38 20 THE COURT: Pardon me?

21 MR. FRIEDMAN: I am Ian Friedman, Mr. Graham's
22 counsel.

23 THE COURT: Right. Right.

24 MR. FRIEDMAN: You are understanding that
16:06:52 25 correctly.

1 THE COURT: Oh, okay.

2 Mr. Graham, is that your signature on the
3 consent to order referral to a Magistrate Judge for purposes
4 of receiving your plea of guilty?

16:07:12 5 THE DEFENDANT: Yes, your Honor.

6 THE COURT: Okay. Have you discussed this
7 consent with your attorney?

8 THE DEFENDANT: Yes, your Honor.

9 THE COURT: Do you understand that you have a
16:07:20 10 right to offer your plea of guilty to a Federal District
11 Judge?

12 THE DEFENDANT: Yes, your Honor.

13 THE COURT: Do you understand by giving this
14 consent to my jurisdiction, you give up the right to offer
16:07:28 15 your guilty plea to the District Judge?

16 THE DEFENDANT: Yes, your Honor.

17 THE COURT: Do you still wish to proceed with
18 your plea before me?

19 THE DEFENDANT: Yes, your Honor.

16:07:36 20 THE COURT: The purposes of this proceeding
21 are as follows:

22 Number one, to establish that you're competent
23 to make a plea.

24 Number two, to make sure that your plea is
16:07:50 25 free and voluntary.

1 Number three, to be certain that you
2 understand the charges that are asserted against you, the
3 maximum penalties for those charges, and the constitutional
4 rights that you are giving up by pleading guilty.

16:08:00 5 Number four, to determine that there's a
6 factual basis for the plea.

7 And, number five, to receive your plea.

8 Do you understand that?

9 THE DEFENDANT: Yes, your Honor.

16:08:06 10 THE COURT: Okay. Before accepting your
11 guilty plea, there are a number of questions the Court will
12 ask you to assure that it is a valid plea. If you do not
13 understand any of the questions or at any time wish to
14 consult with your attorney, please say so since it is
16:08:34 15 essential to a valid plea that you understand each question
16 before you answer.

17 Okay?

18 THE DEFENDANT: Yes, your Honor.

19 THE COURT: Okay. Would you raise your right
16:08:44 20 hand?

21 (Defendant sworn).

22 THE COURT: Okay. Do you understand, having
23 been sworn, your answers to the Court's questions may be
24 used against in you a later prosecution for perjury of
16:08:58 25 making a false -- or making a false statement if you do not

1 answer truthfully?

2 THE DEFENDANT: Yes, your Honor.

3 THE COURT: State your full name.

4 THE DEFENDANT: Scott Terry Graham.

16:09:06 5 THE COURT: State your age.

6 THE DEFENDANT: Thirty-eight.

7 THE COURT: How far did you go in school?

8 THE DEFENDANT: Master's.

9 THE COURT: Master's in what?

16:09:14 10 THE DEFENDANT: Master's in health care

11 administration, sir.

12 THE COURT: Okay. Are you a U.S. citizen?

13 THE DEFENDANT: Yes, sir. Yes, your Honor.

14 THE COURT: Are you able to speak and

16:09:24 15 understand English?

16 THE DEFENDANT: Yes, your Honor.

17 THE COURT: Counsel, have you been able to
18 communicate with the defendant?

19 MR. FRIEDMAN: I have, Your Honor.

16:09:30 20 THE COURT: Have you ever been treated for any
21 mental illness or addiction to narcotic drugs of any kind?

22 THE DEFENDANT: No, Your Honor.

23 THE COURT: Have you taken any drug or
24 medication or alcoholic beverage of any kind within the past
16:09:40 25 24 hours?

1 THE DEFENDANT: No, Your Honor.

2 THE COURT: Do either of you have any reason
3 to doubt the defendant's competence to plead at this time?

4 MR. FRIEDMAN: No, Your Honor.

16:09:50 5 MR. KERN: No, Your Honor.

6 THE COURT: Okay. Do you realize that you
7 have a right to be represented by an attorney at every stage
8 of your case, and if you cannot afford to hire your own
9 counsel, one will be provided?

16:10:06 10 THE DEFENDANT: Yes, your Honor.

11 THE COURT: Now, I have before me a waiver of
12 indictment which states as follows: "I, Scott Graham, the
13 above named defendant who is accused of illegal interception
14 of electronic communications, in violation of Title 18,
16:10:22 15 United States Code, Section 255" -- I'm sorry -- "2511(a),
16 being advised of the nature of the charges, the proposed
17 Information, and of my rights, hereby waive in open court on
18 September 30th, 2009 prosecution by indictment and consent
19 that the proceeding may be by Information rather than
16:10:46 20 indictment."

21 Do you understand that?

22 THE DEFENDANT: Yes, your Honor.

23 THE COURT: And you've already signed that, is
24 that correct?

16:10:50 25 THE DEFENDANT: Yes, your Honor.

1 THE COURT: Okay. And your attorney has also
2 signed it?

3 MR. FRIEDMAN: Yes, your Honor.

4 If I may, respectfully, I know it's just an
16:11:00 5 oversight, the Code section that was just read by the Court,
6 2511, the Court had stated (a), and just to be precise for
7 the record it's 18, United States Code, 2511(1)(a).

8 THE COURT: Okay. So there's a "(1)" missing
9 in there?

16:11:18 10 MR. FRIEDMAN: Correct.

11 THE COURT: All right.

12 MR. FRIEDMAN: Not -- not on the paper, but
13 just as recited onto the record.

14 MR. KERN: No, it's missing on the paper, too.

16:11:28 15 MR. FRIEDMAN: Is it on the paper?

16 THE COURT: Well, I read the paper.

17 THE CLERK: Yeah.

18 MR. KERN: Yeah.

19 MR. FRIEDMAN: Oh, I didn't even have that
16:11:42 20 before me then. I apologize.

21 Correct. There's a "(1)" missing.

22 THE COURT: Well, I'll just insert it.

23 MR. KERN: Thank you, Your Honor.

24 THE COURT: Just put a parentheses around it.

16:11:50 25 All right.

1 Not that I don't read things incorrectly,
2 but --

3 MR. FRIEDMAN: Apologize. I always hate to
4 call out a federal magistrate, so --

16:12:02 5 THE COURT: Well, that's all right. To err is
6 human.

7 MR. FRIEDMAN: That's right.

8 THE COURT: To forgive is divine.

9 MR. FRIEDMAN: Thank you.

16:12:08 10 THE COURT: All right. Have you received a
11 copy of the Information?

12 THE DEFENDANT: Yes, your Honor.

13 THE COURT: Have you had ample opportunity to
14 discuss the charges with your attorney?

16:12:24 15 THE DEFENDANT: Yes, your Honor.

16 THE COURT: Have you told your counsel
17 everything you know about this case?

18 THE DEFENDANT: Yes, your Honor.

19 THE COURT: Has Mr. Friedman fully informed
16:12:32 20 you of the facts and circumstances which form the basis for
21 the charge in the Information and any defenses you might
22 have?

23 THE DEFENDANT: Yes, your Honor.

24 THE COURT: Did he tell you about his
16:12:42 25 discussions with the attorney for the government?

1 THE DEFENDANT: Yes, your Honor.

2 THE COURT: Is your willingness to plead
3 guilty the result of discussions that your attorney has had
4 with the attorney for the government?

16:12:52 5 THE DEFENDANT: Yes, your Honor.

6 THE COURT: Are you satisfied with your
7 attorney's representation and advice given to you in this
8 case?

9 THE DEFENDANT: Yes, your Honor.

16:12:58 10 THE COURT: Let me go over the elements of the
11 charge with you as I'm required to do so by law.

12 Did Mr. Friedman explain to you each and every
13 essential element of the charge for which you are proffering
14 this plea of guilty?

16:13:10 15 THE DEFENDANT: Yes, your Honor.

16 THE COURT: You are pleading guilty to the
17 single count of the Information charging you with committing
18 the illegal interception of wire and electronic
19 communications, in violation of 18, United States Code,
16:13:24 20 Section 255 -- I'm sorry -- 2511(1)(a)?

21 THE DEFENDANT: Yes, your Honor.

22 THE COURT: I think I got that right. All
23 right.

24 In order to sustain its burden of proof for
16:13:38 25 the crime of illegal interception of wire and electronic

1 communications, the government must prove the following
2 essential elements beyond a reasonable doubt.

3 One, you intentionally intercepted and
4 endeavored to intercept or procured another person to
16:13:54 5 intercept or to endeavor to intercept any wire or oral
6 communication; and, two, that you acted knowingly.

7 Do you understand --

8 THE DEFENDANT: Yes, your Honor.

9 THE COURT: -- the elements?

16:14:06 10 THE DEFENDANT: Yes, sir.

11 THE COURT: Okay. All right. Do you
12 understand that the single count in the Information requires
13 that you serve a maximum penalty of five years' imprisonment
14 plus a fine of \$250,000, or both?

16:14:26 15 THE DEFENDANT: Yes, your Honor.

16 THE COURT: Okay. In addition, in Paragraph 3
17 of the plea agreement it states "The maximum fine that the
18 Court may impose is the greater of the statutory maximum
19 stated above or twice the gross pecuniary loss or gain from
16:14:40 20 the offense of conviction."

21 Do you understand that?

22 THE DEFENDANT: Yes, your Honor.

23 THE COURT: And you've agreed to that in the
24 plea agreement?

16:14:52 25 THE DEFENDANT: Yes, your Honor.

1 THE COURT: Okay. Are you aware that the
2 crime charged in the sole count in the Information is
3 probationable and that you will be eligible for a sentence
4 of probation?

16:15:08 5 You could receive up to five years, but not
6 less than one year of probation.

7 THE DEFENDANT: Yes, your Honor.

8 THE COURT: In addition, the Court may include
9 a term of supervised release of three years. Supervised
16:15:20 10 release is a term of supervision in addition to and
11 following any term of imprisonment imposed by the Court.

12 Do you understand if the Court finds that you
13 have violated a condition of supervised release, it may send
14 you back to prison for up to two years, regardless of how
16:15:36 15 much of your term of supervised release you served before
16 you violated a condition?

17 THE DEFENDANT: Yes, your Honor.

18 THE COURT: Do you understand if the Court
19 sends you back to prison for less than two years, it may
16:15:50 20 impose a further term of supervised release following
21 imprisonment?

22 THE DEFENDANT: Yes, your Honor.

23 THE COURT: In addition, you may be ordered to
24 make restitution in the form of money or services in lieu of
16:16:00 25 money to the victims of the offenses or make restitution to

1 a person or organization designated by the victims or the
2 victims' estate?

3 THE DEFENDANT: Yes, your Honor.

4 THE COURT: In this case under Paragraph 13 of
16:16:10 5 the plea agreement, you've agreed as follows: "The
6 defendant agrees to pay restitution to Akron General
7 Children's Hospital, Akron Children's Hospital, in the
8 amount of \$33,000 for losses caused by defendant's relevant
9 conduct in this case as defined under Guidelines Section
16:16:24 10 1B1.3. Defendant understands that any restitution ordered
11 will be due and payable immediately on such terms and
12 conditions as the Court may impose.

13 "Defendant agrees not to seek the discharge of
14 any restitution obligation in whole or in part in any
16:16:38 15 present or future bankruptcy proceeding."

16 Do you understand that?

17 THE DEFENDANT: Yes, your Honor.

18 THE COURT: You've agreed to that in the plea
19 agreement?

16:16:44 20 THE DEFENDANT: Yes, your Honor.

21 THE COURT: Okay. Have the victims been
22 provided notice of a plea hearing pursuant to the Justice
23 For All Act?

24 MR. KERN: Yes, they have, Your Honor.

16:17:02 25 THE COURT: Okay. Further, since this is a

1 felony, there's a hundred dollar special assessment which
2 shall be imposed and is due and payable at the time of
3 sentencing.

4 You may be required to pay the costs of
16:17:18 5 imprisonment or supervised release or probation, if granted.

6 You may be required to forfeit certain
7 property to the government.

8 The Court may order you to provide notice of
9 the convictions to victims.

16:17:28 10 For the record, the Court has been given a
11 signed written plea agreement.

12 Is that your signature, Mr. Graham?

13 THE DEFENDANT: Yes, your Honor.

14 THE COURT: Did you read and discuss the plea
16:17:36 15 agreement with your attorney before you signed it?

16 THE DEFENDANT: Yes, your Honor.

17 THE COURT: Mr. Kern, what does the substance
18 of the plea agreement provide?

19 MR. KERN: Yes, your Honor. May it please the
16:17:50 20 Court, the plea agreement provides that Mr. Graham would
21 waive indictment and enter a guilty plea to the one count
22 Information which charges the violation as the Court has
23 already gone over.

24 The defendant further agrees to pay
16:18:04 25 restitution to Akron Children's Hospital in the amount of

1 \$33,000 to reimburse the hospital for damages caused by his
2 conduct.

3 The government agrees not to initiate any
4 additional charges against Mr. Graham arising from the facts
16:18:22 5 and circumstances related to this matter that are already
6 known to the United States Attorney's Office.

7 The plea agreement at Paragraph 12 contains a
8 waiver of the defendant's appellate and post-conviction
9 rights, substantially all of them.

16:18:42 10 The defendant does reserve the right to appeal
11 in three limited situations.

12 First, to the extent that any punishment would
13 be in excess of the statutory maximum.

14 Secondly, if the sentence were to exceed the
16:18:56 15 maximum of the sentencing range determined under the
16 advisory Guidelines in accordance with the stipulations and
17 computations set forth in the plea agreement, and if there
18 were any alleged errors in calculating his criminal history
19 score.

16:19:12 20 The plea agreement also does -- reserves or as
21 the defendant would always have the right to challenge on
22 appeal or collateral attack any claims of prosecutorial
23 misconduct or ineffective assistance of counsel.

24 Paragraph 13, as the Court has already
16:19:30 25 reviewed, covers the defendant's agreement to make

1 restitution to the hospital.

2 In Paragraph 14, the parties have agreed to
3 recommend that the Court impose a sentence of the kind and
4 within the range determined under the advisory Guidelines in
16:19:46 5 accordance with the computations and stipulations in the
6 plea agreement.

7 Specifically, the United States Attorney's
8 Office will not request a sentence higher than the advisory
9 Guideline range, and the defendant has agreed not to request
16:19:58 10 a sentence lower than the range.

11 The parties have set forth what they believe
12 the Guidelines computation is in this case, using the
13 Guidelines manual in effect as of November 1st, 2008.

14 Under Guideline Section 2H3.1, the base
16:20:20 15 offense level is nine. There were no enhancements, for a
16 subtotal of nine prior to acceptance of responsibility.

17 The government believes at this time that
18 there's no reason not to give Mr. Graham credit for
19 acceptance of responsibility.

16:20:40 20 If the Court agrees with that, and assuming
21 that Mr. Graham's conduct between now and the time of
22 sentencing does not show any problems in that regard, the
23 two-level reduction for acceptance of responsibility would
24 result in a total adjusted offense level of seven.

16:21:02 25 There is no agreement regarding Mr. Graham's

1 criminal history category. He understands that his criminal
2 history score will be computed by the Court following the
3 completion of the pre-sentence investigation report.

4 The plea agreement also sets forth that the
16:21:22 5 defendant understands that the recommendations and
6 stipulations in the plea agreement are just that, they're
7 recommendations to the Court. They're not binding upon the
8 Court. And that the Court will be determining the
9 applicable sentencing range, whether there's any basis to
16:21:38 10 depart from that range, and ultimately what sentence should
11 be imposed in the case.

12 Mr. Graham understands that if he's not happy
13 with the sentence that's imposed by the Court, that that
14 does not give him a right to withdraw his guilty plea.

16:21:56 15 The plea agreement also contains consequences
16 if the plea agreement is breached by the defendant,
17 basically that if the plea or the conviction in the case are
18 set aside, rejected or vacated at any time, the U.S.
19 Attorney's Office is then released from all of its
16:22:18 20 obligations under the agreement, may institute or maintain
21 any charges, make any recommendations with respect to
22 sentencing that might otherwise be prohibited under this
23 agreement.

24 He understands that in such a situation, the
16:22:32 25 U.S. Attorney's Office may use all information from any of

1 his sworn or unsworn statements against him or to impeach
2 him or any witnesses called on his behalf.

3 And the defendant also understands that a
4 breach of the agreement by him will not entitle him to
16:22:48 5 withdraw, vacate, or set aside his plea or conviction.

6 The plea agreement is binding only on the U.S.
7 Attorney's Office for the Northern District of Ohio. It
8 does not bind any other federal, state or local governmental
9 bodies.

16:23:16 10 And I believe other than indicating that
11 Mr. Graham is satisfied with the representation that
12 Mr. Friedman has provided, and that the agreement has been
13 entered into voluntarily, and that no threats or promises
14 have been made either directly or indirectly to enter the
16:23:36 15 plea or to not enter a plea, other than the factual basis,
16 Your Honor, that would be the terms of the agreement.

17 THE COURT: Mr. Friedman, has the substance of
18 the plea agreement been correctly stated by Mr. Kern?

19 MR. FRIEDMAN: It has, Your Honor.

16:23:52 20 THE COURT: Does the plea agreement represent
21 in its entirety the understanding you have with the
22 government?

23 THE DEFENDANT: It does, Your Honor.

24 THE COURT: Mr. Graham, is that your
16:24:12 25 understanding of the plea agreement?

1 THE DEFENDANT: Yes, your Honor.

2 THE COURT: Is there anything about the plea
3 agreement that you do not understand?

4 THE DEFENDANT: No, Your Honor.

16:24:18 5 THE COURT: Has anyone made any other or
6 different promises or assurances to get you to plead guilty
7 in this case?

8 THE DEFENDANT: No, Your Honor.

9 THE COURT: Mr. Graham, do you understand that
16:24:26 10 the terms of your plea agreement, which also encompasses the
11 advisory Guideline range contemplated by the parties, are
12 merely recommendations to the Court; that the Court can
13 reject recommendations, and if it imposes a sentence that is
14 more severe than you may anticipate from the Guideline
16:24:42 15 calculations set forth in your plea agreement, you would not
16 be permitted to withdraw your guilty plea?

17 THE DEFENDANT: Yes, your Honor.

18 THE COURT: In your plea agreement, at
19 Paragraph 14 entitled sentencing stipulations and
16:25:06 20 agreements, recommendation to use the Sentencing Guideline
21 computation, states as follows: "After considering the
22 sentencing factors in 18, U.S.C., Section 3553(a), the
23 parties agree to recommend that the Court impose a sentence
24 of the kind and within the range determined pursuant to the
16:25:22 25 advisory Sentencing Guidelines in accordance with the

1 computations and stipulations set forth below.

2 "The United States Attorney's Office will not
3 request a sentence higher than the advisory Sentencing
4 Guideline range, and the defendant will not request a
16:25:36 5 sentence lower than the advisory Sentencing Guideline
6 range."

7 Do you understand that?

8 THE DEFENDANT: Yes, your Honor.

9 THE COURT: And you agree to that in the plea
16:25:42 10 agreement?

11 THE DEFENDANT: Yes, your Honor.

12 THE COURT: Do you understand that
13 you're -- you are agreeing that your sentence will be
14 governed by the Federal Sentencing Guidelines?

16:25:52 15 In other words, the Court will sentence you
16 within the appropriate advisory range determined by the
17 Court at your sentencing hearing.

18 THE DEFENDANT: Yes, your Honor.

19 THE COURT: Have you and your attorney talked
16:26:00 20 about how the Sentencing Commission Guidelines might apply
21 to your case?

22 THE DEFENDANT: Yes, your Honor.

23 THE COURT: Do you understand that the
24 Sentencing Commission Guidelines are no longer mandatory?

16:26:10 25 In other words, the District Judge is not

1 bound to apply the Guidelines. However, the Guidelines are
2 advisory, and he must calculate the applicable Guideline
3 range and take that into account when he imposes a sentence.

4 He must also consider possible departures
16:26:22 5 under the Guidelines or any other sentencing factors under
6 18, United States Code, Section 3553(a).

7 Do you understand that?

8 THE DEFENDANT: Yes, your Honor.

9 THE COURT: Has anyone made any prediction,
16:26:34 10 prophecy, or promise to you as to what your sentence will
11 be?

12 THE DEFENDANT: No, Your Honor.

13 THE COURT: Have you asked your attorney what
14 your sentence will be?

16:26:46 15 Did he give you some estimates?

16 THE DEFENDANT: Yes, your Honor.

17 THE COURT: Okay. Do you understand that the
18 Court will not be able to determine your sentence for your
19 case until after the pre-sentence report has been completed?

16:26:58 20 THE DEFENDANT: Yes, your Honor.

21 THE COURT: Do you understand that you will
22 not be able to withdraw your plea if the sentence imposed is
23 different from any estimate your attorney may have given
24 you?

16:27:06 25 THE DEFENDANT: Yes, your Honor.

1 THE COURT: Do you understand that parole has
2 been abolished, and if you are sentenced in prison, you will
3 not be eligible for early release on parole?

4 THE DEFENDANT: Yes, your Honor.

16:27:20 5 THE COURT: What did you do in connection with
6 the acts charged in the single count in the Information?

7 MR. FRIEDMAN: Are you asking him the specific
8 conduct, Your Honor?

9 THE COURT: Yeah, what --

16:27:44 10 THE DEFENDANT: I --

11 THE COURT: -- factual basis is there for this
12 plea?

13 THE DEFENDANT: I -- over hearsay I found
14 there's a different case that I was involved in, retaliation
16:28:12 15 case, that this kind of ties into, and I found out that the
16 person who came forward to tell me and I actually -- I
17 actually went to the director of the hospital and
18 made -- made a statement to them based on this girl's
19 testimony or this girl's statement she was raped.

16:28:42 20 And I was retaliated against after I made that
21 statement. And within a year, I found out that this person
22 may not have been so honest, and I went and I paid \$114 for
23 a spy program and I confirmed my suspicion.

24 And I regret doing that and --

16:29:18 25 MR. FRIEDMAN: What was your understanding of

1 the spy program, what it was going to do?

2 THE DEFENDANT: Basically it would just go
3 through the e-mail and I would get e-mail -- it would open
4 up an e-mail that was sent to her, her account, but it was
16:29:32 5 also that e-mail was set up for both of us. We both set it
6 up and wrote to each other on that e-mail.

7 THE COURT: Okay. Is that related to the
8 protection order --

9 THE DEFENDANT: Yes, your Honor.

16:29:46 10 THE COURT: -- in Medina Common Pleas Court,
11 Case Number 08CRE0749, is that correct?

12 THE DEFENDANT: Yes, your Honor.

13 And that person also has the same protection
14 order against her as well during that period. There might
16:30:06 15 be some difference in the order, but it's basically the
16 same.

17 THE COURT: Okay. What in summary would be
18 the government's evidence as to this count?

19 MR. KERN: Yes, your Honor. Were the case to
16:30:14 20 proceed to trial, the evidence would establish by proof
21 beyond a reasonable doubt that between February 29th of 2008
22 and March 28th of 2008, in this district, that Mr. Graham
23 intentionally intercepted and endeavored to intercept
24 electronic communications, in violation of Title 18, United
16:30:36 25 States Code, Section 2511(1)(a).

1 Specifically, Your Honor, the evidence would
2 show that on or about February 27th of 2008, Mr. Graham
3 purchased a computer software program over the Internet
4 known as Spy Agent, Spy Anywhere Suite, Stealth Edition,
16:30:56 5 Full Version and a one year subscription to a stealth e-mail
6 account for \$114.85.

7 The evidence would show that Spy Agent, Spy
8 Anywhere is a software program, is a real-time monitoring
9 program that secretly monitors or spies upon all computer
16:31:18 10 activity on a victim's computer without their knowledge and
11 transmits the captured information or data, including all
12 the key strokes that are entered on the computer, to a
13 stealth e-mail account.

14 The evidence would show that on or about
16:31:32 15 March 19th of 2008, Mr. Graham intentionally sent an e-mail
16 containing an attachment with this malicious code or
17 commands to a Yahoo e-mail account of a woman with whom
18 Mr. Graham had previously had a personal relationship,
19 knowing that when the attachment to the e-mail was opened,
16:31:52 20 that the spyware monitoring software would be
21 surreptitiously installed on the woman's computer, thereby
22 enabling Mr. Graham to remotely monitor all activity on her
23 computer.

24 The evidence would also show that on or about
16:32:06 25 the same date, March 19th, the woman opened Mr. Graham's

1 e-mail containing the malicious code, thereby deploying the
2 spyware monitoring software on the computer she was using at
3 the time.

4 However, the computer upon which the spyware
16:32:24 5 was installed was not her personal computer but rather it
6 was a computer owned by Akron Children's Hospital and was
7 located in the pediatric cardiac surgery department of the
8 hospital.

9 The evidence would also show that between
16:32:38 10 March 19th, 2008 and March 28th of 2008, that this
11 monitoring software was also opened and installed on at
12 least one other computer owned by Akron Children's Hospital,
13 thereby subjecting it to surreptitious real-time monitoring
14 by this stealth e-mail program that Mr. Graham had launched.

16:33:04 15 Subsequent reviews of the stealth e-mail
16 account and forensic examination of the computers at Akron
17 Children's Hospital that were affected between -- show that
18 between March 19th of 2008 and March 28th of 2008, that this
19 spyware key stroke logger intentionally originally
16:33:26 20 transmitted by Mr. Graham had captured approximately 1,040
21 screen views or snapshots of information displayed on the
22 Akron Children Hospital monitors, on the computers, and had
23 transmitted the data to the stealth e-mail account
24 maintained by Mr. Graham.

16:33:46 25 Evidence would show that of these 1,040 screen

1 views, approximately 920 of them contained confidential
2 patient information regarding 62 patients of the hospital
3 and also include their personal identifier information and
4 medical information of the patients.

16:34:06

5 The information captured for 14 of the
6 patients related to medical procedures and/or diagnostic
7 notes.

16:34:24

8 The evidence would also show that the other
9 120 screen views captured by Mr. Graham's program contained
10 various information, including personal e-mail and financial
11 records of four other hospital employees who apparently
12 utilized the affected computers to access the Internet
13 during this time period.

16:34:42

14 THE COURT: Does counsel agree with the
15 summary?

16 MR. FRIEDMAN: I do, Your Honor.

17 THE COURT: Do you agree with the prosecutor's
18 summary of what you did?

19 THE DEFENDANT: Yes, your Honor.

16:34:48

20 THE COURT: It's basically what was recited in
21 the plea agreement which you've already agreed to and
22 signed, is that correct?

23 THE DEFENDANT: Yes, your Honor.

16:34:58

24 THE COURT: Is there anything he stated that
25 was not correct?

1 THE DEFENDANT: No, Your Honor.

2 THE COURT: Pardon me?

3 THE DEFENDANT: No, Your Honor.

4 THE COURT: Oh, okay. The Court finds a
16:35:02 5 factual basis for the plea.

6 Do you understand that you have the right to a
7 jury trial; that is, your right to have twelve people from
8 the community decide your case? In order to return a
9 verdict against you, all twelve jurors would have to agree
16:35:22 10 upon their verdict and the verdict would have to be
11 unanimous.

12 THE DEFENDANT: Yes, your Honor.

13 THE COURT: Do you further understand that if
14 you went to trial, you would be entitled to the assumption
16:35:32 15 of innocence which means that you do not have to prove that
16 you were innocent?

17 In other words, you do not have to prove to
18 those twelve jurors that you did not commit the crime. That
19 is up to the government to prove.

16:35:42 20 Do you understand that?

21 THE DEFENDANT: Yes, your Honor.

22 THE COURT: You have the right to require the
23 government to prove each and every element of the charge
24 beyond a reasonable doubt, and if the government fails to
16:35:52 25 prove any one element of the charge, you must be found not

1 guilty of the charge or any one of the charges that the
2 government could not prove all the elements.

3 And if you went to trial, you would have the
4 right to confront the witnesses presented by the government,
16:36:10 5 which means you would have the right to cross-examine and
6 challenge the testimony of the witnesses that would testify
7 against you.

8 Do you understand that?

9 THE DEFENDANT: Yes, your Honor.

16:36:20 10 THE COURT: Do you further understand that in
11 a criminal case, the burden of proof never shifts to the
12 defendant. That there's no burden on you to prove your
13 innocence.

14 That if you went to trial, that you cannot be
16:36:30 15 compelled to take the witness stand and testify against
16 yourself, and that the government could not comment on your
17 refusal or failure to testify.

18 Do you understand that?

19 THE DEFENDANT: Yes, your Honor.

16:36:38 20 THE COURT: However, if you decide to call
21 witnesses to testify in your behalf, you would have the
22 right to compulsory process which is simply the right to
23 compel the presence of any witness you want to call at trial
24 through the subpoena power of the Court.

16:36:54 25 Do you understand that each of these trial

1 rights are waived if the District Judge accepts your guilty
2 plea?

3 THE DEFENDANT: Yes, your Honor.

4 THE COURT: Finally, if you went to trial and
16:37:02 5 you were found guilty, you would have the right to appeal
6 your conviction. This is an absolute right.

7 And if you're unable to hire an attorney to
8 represent you on appeal and it is determined that you are
9 indigent, the Court would appoint a lawyer to represent you.

16:37:14 10 And if you cannot afford to pay the cost of
11 filing your appeal, the Court would grant you ten days
12 within which to file your appeal without paying the costs.

13 Do you understand that you're giving up those
14 appellate rights as well when you enter a plea of guilty?

16:37:36 15 THE DEFENDANT: Yes, your Honor.

16 THE COURT: Now, there's a waiver of appellate
17 rights in your plea agreement which differs from the waiver
18 of appellate rights that I just went over with you. I'm
19 going to distinguish the two for you.

16:37:44 20 If you went to trial and you were convicted,
21 you would have the right to appeal the merits of your case.
22 Ordinarily you have the right to challenge your conviction
23 by filing an appeal or writ of habeas corpus if you believe
24 your guilty plea was somehow unlawful or involuntary.

16:37:58 25 Do you understand that?

1 THE DEFENDANT: Yes, your Honor.

2 THE COURT: You also have a statutory right to
3 appeal your sentence under certain circumstances,
4 particularly if you think the sentence is contrary to law.

16:38:08 5 The government also has the right to appeal
6 the sentence if it believes it is contrary to the law.

7 However, the defendant may waive those rights
8 as part of a plea agreement. And you have entered into a
9 plea agreement which waives some or all of your rights to
16:38:20 10 challenge the judgment or conviction and the sentence by way
11 of appeal or habeas corpus.

12 Do you understand that?

13 THE DEFENDANT: Yes, your Honor.

14 THE COURT: Such waivers are enforceable, but
16:38:30 15 if you believe the waiver is unenforceable, you can present
16 that theory to the Appellate Court.

17 Now, Paragraph 12 of your plea agreement
18 entitled waiver of appeal and post-conviction attack, you
19 agreed as follows: "Defendant acknowledges having been
16:38:48 20 advised by counsel of defendant's right in limited
21 circumstances to appeal the conviction or sentence in this
22 case, including the appeal right conferred by 18, United
23 States Code, Section 3742 and to challenge the conviction or
24 sentence collaterally through a post-conviction proceeding,
16:39:04 25 including a proceeding under 28, U.S.C., Section 2255. The

1 defendant expressly waives those rights except as reserved
2 below.

3 "The defendant reserves the right to appeal:
4 A, any punishment in excess of the statutory maximum; B, any
16:39:18 5 sentence to the extent it exceeds the maximum of the
6 sentencing range determined under the advisory Sentencing
7 Guidelines and in accordance with the sentencing
8 stipulations and computations in this agreement using the
9 criminal history category found applicable by the Court;
16:39:38 10 and, C, any alleged errors in the calculation of his
11 criminal history category.

12 "Nothing in this paragraph shall act as a bar
13 to the defendant perfecting any legal remedies defendant may
14 otherwise have on appeal or collateral attack respecting
16:40:02 15 claims of ineffective assistance of counsel or prosecutorial
16 misconduct."

17 Do you understand that?

18 THE DEFENDANT: Yes, your Honor.

19 THE COURT: And you've agreed to that in the
16:40:08 20 plea agreement?

21 THE DEFENDANT: Yes, your Honor.

22 THE COURT: Has anyone made any promises,
23 other than the plea agreement, that induced you to plead
24 guilty?

16:40:20 25 THE DEFENDANT: No, Your Honor.

1 THE COURT: Has anyone threatened or forced
2 you in any way to plead guilty?

3 THE DEFENDANT: No, Your Honor.

4 THE COURT: Having discussed your rights with
16:40:28 5 you, do you still want to plead guilty?

6 THE DEFENDANT: Yes, your Honor.

7 THE COURT: Please state your plea.

8 THE DEFENDANT: Guilty, Your Honor.

9 THE COURT: Are you pleading guilty to the
16:40:38 10 offense because you are, in fact, guilty of the offense
11 charged in the single count in the Information?

12 THE DEFENDANT: Yes, your Honor.

13 THE COURT: The Court, having fully advised
14 the defendant of the effect of his plea, finds the plea has
16:40:48 15 been freely and voluntarily made with full knowledge of the
16 consequences.

17 And since the defendant has acknowledged that
18 he is, in fact, guilty of the charge, I recommend that the
19 District Judge approve the plea agreement and accept the
16:41:08 20 plea of guilty and adjudge the defendant guilty of the
21 offense charged in the single count of the Information.

22 This matter is continued pending a
23 pre-sentence investigation and report.

24 Mr. Graham, you will be asked to give
16:41:22 25 information for the report, at which time your attorney may

1 be present if you so desire.

2 Do you understand that?

3 THE DEFENDANT: Yes, your Honor.

4 THE COURT: The Court will permit you and your
16:41:30 5 counsel to read the pre-sentence report before the
6 sentencing hearing, and you can make objections or request
7 corrections that you think are appropriate.

8 And, of course, you and your attorney will
9 have an opportunity to speak at the sentencing hearing.

16:41:40 10 Do you understand that?

11 THE DEFENDANT: Yes, your Honor.

12 THE COURT: Now, we have a date for
13 sentencing. We have it somewhere in here.

14 February 10th, 2010 at 10:00 a.m. before Judge
16:41:58 15 Economus. He's on the third floor of this building. That's
16 February 10th, 2010 at 10:00 a.m.

17 Mr. Graham, failure to appear for sentencing
18 is a criminal offense, and any sentence imposed as a result
19 shall be consecutive to the sentence for the offense to
16:42:36 20 which you have pled guilty.

21 Do you understand that?

22 THE DEFENDANT: Yes, your Honor.

23 THE COURT: You have to make sure you're here.

24 THE DEFENDANT: Yes, your Honor.

16:42:42 25 THE COURT: Now, does the government object to

1 the Pretrial Services report on the recommendation of bond?

2 MR. KERN: No, Your Honor. We concur with all
3 the recommendations in the report.

4 THE COURT: I assume defense counsel does,
16:42:54 5 too?

6 MR. FRIEDMAN: We do, Your Honor.

7 And I've spoken with Mr. Graham, he will be
8 prepared to surrender the passport tomorrow.

9 I think it's also important to note, Your
16:43:02 10 Honor, that Mr. Graham's been well-aware of these matters
11 for quite some time, is here, and as part of the restitution
12 has already made a check payable to my law firm and we are
13 prepared to write a check from the law firm for restitution
14 in full in this matter.

16:43:24 15 So clearly I think that his actions --

16 THE COURT: Is that \$33,000, is that what
17 you're talking about?

18 MR. FRIEDMAN: Correct, the \$33,000.

19 So we're just waiting on direction from
16:43:50 20 Pretrial Services and/or Probation, but clearly his -- his
21 actions dictate or say or are those of a person who intends
22 to see this case through.

23 THE COURT: Okay. All right. Well, let me go
24 over some of the terms of the bond for the sake of the
16:44:08 25 record.

1 This is an unsecured \$25,000 bond. Standard
2 conditions of release. The defendant shall not commit any
3 offense in violation of federal, state, or local law while
4 on release in this case.

16:44:30 5 The defendant shall immediately advise the
6 Pretrial Service office, defense counsel, and the U.S.
7 Attorney in writing before any change in address and
8 telephone number.

9 The defendant shall refrain from possessing a
16:44:50 10 firearm, destructive device, or dangerous weapon.

11 Defendant's travel is restricted to the
12 Northern District of Ohio and/or subject to further order of
13 the Court.

14 Defendant shall refrain from use or unlawful
16:45:00 15 possession of a narcotic drug or other controlled substance
16 defined in 21, U.S.C., Section 802 unless prescribed by a
17 licensed medical practitioner.

18 The defendant shall appear at all proceedings
19 as required; shall surrender for service of any sentence
16:45:14 20 imposed as directed.

21 Defendant shall submit to Pretrial Services
22 supervision as directed, and submit to home or employment
23 visits by Pretrial Services as deemed necessary, and
24 promptly inform Pretrial Services of any address, phone
16:45:28 25 number or employment changes.

1 It is further ordered that if released, the
2 defendant is subject to the special conditions marked below.

3 The defendant shall surrender any passport to
4 the Clerk of Court no later than September 30th, 2009,
16:45:54 5 and/or obtain no new passport.

6 He shall avoid all contact directly or
7 indirectly with any persons who are or who may become a
8 victim or potential witness in the subject investigation or
9 prosecution.

16:46:08 10 He must maintain residence at his current
11 residence.

12 MR. FRIEDMAN: Your Honor, if I may be heard
13 just simply on one other condition.

14 THE COURT: Go ahead.

16:46:28 15 MR. FRIEDMAN: Thank you.

16 Your Honor, as the first paragraph of the
17 Pretrial Services report, specifically under defendant
18 history, residence, family ties indicates, Mr. Graham has
19 been a member of the United States Navy since 1989.

16:46:46 20 The last sentence of that first paragraph,
21 "The defendant enlisted in the Navy Reserve 15 months ago
22 and is an active member," as we stand here today, he remains
23 an active member.

24 Each month at the end of the month for four
16:46:58 25 days he is to report for his duties in the Navy Reserve, and

1 at that time he does have a firearm, only while away.

2 And so I would ask the Court just to make a
3 specific exception that while on duty in the Navy Reserves
4 and away, that he do be able to have his Service firearm.

16:47:18 5 THE COURT: Does the government have any
6 objection to that?

7 MR. KERN: No, Your Honor.

8 Obviously following the sentencing, I think
9 that is probably going to change at some point, but for the
16:47:28 10 time being, we really have no reason to oppose that.

11 THE COURT: Could I just say "Except on active
12 duty in the Navy Reserves"?

13 MR. FRIEDMAN: That --

14 THE COURT: Does that make sense?

16:47:46 15 MR. FRIEDMAN: That should be sufficient.
16 Thank you.

17 THE COURT: All right. Why don't we have
18 everybody initial this?

19 THE CLERK: Okay.

16:48:12 20 MR. FRIEDMAN: Your Honor, Mr. Kern also
21 brought up a valid point, that the restriction to the
22 Northern District of Ohio probably also should have the
23 exception that when he is on active duty, so the firearm
24 provision and the travel provision.

16:48:30 25 THE COURT: Where will he be on active duty?

1 THE DEFENDANT: Joliet, Illinois or Florida,
2 Panama City, Florida.

3 THE COURT: And/or Illinois and Florida, why
4 don't I just say "Illinois and Florida"?

16:48:58 5 MR. KERN: That's fine, Your Honor.

6 MR. FRIEDMAN: Yes, your Honor.

7 THE COURT: I'm not going to say "Navy
8 Reserves."

9 Anything else?

16:49:20 10 MR. FRIEDMAN: No. Thank you, Your Honor.

11 THE COURT: That's it?

12 MR. FRIEDMAN: Yeah.

13 MR. KERN: Your Honor, just I guess Pretrial
14 Services actually raised a good point, that the weapon that
16:49:32 15 he would have access to while he's on active duty, is that
16 something that is maintained at the naval base or is that
17 something that --

18 THE DEFENDANT: Yes.

19 MR. KERN: -- he transports?

16:49:46 20 THE DEFENDANT: No, it's maintained.

21 MR. KERN: It's at the base?

22 THE DEFENDANT: Yes.

23 MR. KERN: Okay. All right. Because they
24 have a concern about having a weapon during -- at the
16:50:24 25 residence during the time he's on supervision. That's --

1 THE COURT: Okay.

2 MR. KERN: That's the only concern.

3 THE COURT: All right. So we need to address
4 that concern.

16:50:34 5 MR. KERN: Okay. Thank you, Judge.

6 MR. FRIEDMAN: Just initial this?

7 (Discussion had off the record).

8 THE COURT: You're going to have the passport
9 tomorrow, is that correct?

16:51:28 10 THE DEFENDANT: Yes, your Honor.

11 THE COURT: Okay. Because this says
12 September 30th. I think we'll just leave it. It's on the
13 record that you're going to turn it in tomorrow, which is
14 October 1st.

16:51:40 15 THE DEFENDANT: Yes, your Honor.

16 THE COURT: Okay. Do you acknowledge you are
17 the defendant in this case and you are aware of the
18 conditions of release?

19 THE DEFENDANT: Yes, your Honor.

16:51:48 20 THE COURT: Do you promise to obey all
21 conditions of release, to appear as directed, and to
22 surrender for service of any sentence imposed?

23 THE DEFENDANT: Yes, your Honor.

24 THE COURT: And are you aware of the penalties
16:52:04 25 and sanctions set forth in the bond?

1 THE DEFENDANT: Yes, your Honor.

2 THE COURT: Okay. Defendant is ordered
3 released after processing.

4 Has he been processed or --

16:52:22 5 MR. FRIEDMAN: No, I don't believe so.

6 THE DEPUTY MARSHAL: He has not, Your Honor.

7 THE COURT: Okay. So he'll have to go to the
8 Marshal's Office.

9 Anything further from defense counsel?

16:52:38 10 MR. FRIEDMAN: No. Thank you, Your Honor.

11 THE COURT: Does the government have anything
12 further?

13 MR. KERN: No, Your Honor. Thank you.

14 THE COURT: Okay. We're adjourned then.

16:52:44 15 THE CLERK: All rise.

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17 (Proceedings concluded)

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C E R T I F I C A T E

I, Susan Trischan, within and for the State of Ohio,
do hereby certify that the above transcript is a true and
accurate record of the hearing held before Magistrate Judge
George J. Limbert. This record was prepared from a tape
provided by the Court.

/s/ Susan Trischan

/S/ Susan Trischan, RMR, CRR
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